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Supreme Court, U.S.
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No. 97-439

In The

Supreme Court of the United States

October Term, 1996

ERNEST L. JARRETT, Attorney,

Petitioner,

vs.

ROSE MARY GREEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT FIRST BUSEY TRUST & INVESTMENT COMPANY (GUARDIAN OF THE ESTATE OF JACQUELINE DENNISON)

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15 pp

SUPPLEMENT TO LIST OF PARTIES

The Petition for Writ incorrectly lists Kim Nihiser as mother and next friend of Jacqueline Dennison, a minor, as a respondent.

While she initially appeared on behalf of Jacqueline Dennison, this respondent, First Busey Trust and Investment Company, as Guardian of the Estate of Jacqueline Dennison, ultimately became the representative of said minor.

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Rule Cited:

Federal Rule of Civil Procedure, 41(a)(1)(ii) 1, 6

STATUTES INVOLVED

Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure:

> (1) *By Plaintiff;* by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Michigan Compiled Laws 600.2922:

> (5) Motion for settlement; hearing. If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.
>
> (6) Damages; distribution. In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable

compensation for the pain and suffering, while conscious, undergone by the deceased person during the period interviewing between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(a) The personal representative shall filed with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(b) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(c) If any interested person is a minor, a disappeared person as defined in section 4 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.4 of the Michigan Compiled Laws, or a legally incapacitated person for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the

notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated person.

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled tot he proceeds is a minor, a disappeared person, or a legally incapacitated person and all of the persons entitled to the proceeds

> execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

SUPPLEMENTAL STATEMENT OF CASE

Contrary to most wrongful death acts, under the Michigan Wrongful Death Act a broad spectrum of individuals are eligible as beneficiary. For example, the beneficiaries in the case at bar included two acknowledged daughters, an estranged wife, two children of the estranged wife by prior marriage, the parents and the siblings of the deceased.

From day one, the petitioner failed to appreciate the conflicting claims of the various beneficiaries. The petitioner attempted to force the federal court to approve a proposed settlement that distributed the money to the beneficiaries in a manner far different than what was ultimately approved. The proposed settlement, which the petitioner placed before the court, contained numerous structured settlements which would have prevented the court from allocating the proceeds in a different manner after an evidentiary hearing. Under the circumstances, the only proper course for the petitioner was to present a gross settlement without allocation.

The case was properly removed from state court in that a 42 U.S.C. § 1983 Civil Rights Act Claim was asserted. When the tortured procedural history of the case is analyzed, it is clear that the court had jurisdiction to enter the orders before in fact entered.

The petitioner's statement of the case is totally lacking in citation to the record and unfortunately contains statements that it is respectfully suggested are contrary to the record. The petitioner indicates that Rose Mary Green, the estranged wife, and Edniquech Grubbs, the adult daughter, retained the referring attorney Brunetta Brandy. Unfortunately, petitioner omits to advise that they separately retained her in their individual capacity. After they were appointed co-personal representatives, they did not either jointly or severally retain Brandy or anyone else as an attorney for the estate.

REASONS FOR DENYING THE WRIT

I.

THE COURT HAD AND PROPERLY RETAINED JURISDICTION.

In that a 42 U.S.C. § 1983 claim was asserted, there can be no question but what the case was properly removed to the district court and that the district court in fact had jurisdiction.

As to the petitioner's contention that a stipulation for dismissal of December 14, 1992 deprived the court of jurisdiction, there is no question but what on December 22, 1992 there was a stipulation as to the court's continued jurisdiction which obviously rendered the December 14 stipulation moot in the event it would have otherwise been valid.

It is respectfully suggested that while suit must be brought by the personal representatives, the beneficiaries are the real party in interest. They are required under Michigan law to be notified of significant actions and entitled to present a position in regards thereto to the court. MCL 600.2922. This respondent and the parents and siblings of the decedent were entitled to

and did object to the dismissal of the case. In any event, the purported dismissal of January 7, 1993 that petitioner relies upon was executed by Brunetta Brandy on behalf of co-personal representative Rose Mary Green but was not executed by Edniquech Grubbs, either through counsel or in her own right. Rule 41(a)(1)(ii) requires that all parties execute a stipulation to dismiss for the stipulation to be effective. The failure of Grubbs to execute the stipulation clearly rendered it void. Further, it is respectfully suggested the beneficiaries as interested parties had to execute the stipulation. Obviously, the reason Brandy attempted to use a stipulation rather than filing a motion was the certain knowledge on her part that the dismissal would be strenuously opposed by certain beneficiaries.

Accordingly, without reaching the inherent power of the court to refuse to give effect to a stipulated dismissal, it is clear the matter was properly before the court. Turning to the court's inherent power, the trial court and the Sixth Circuit properly noted that a court can refuse a voluntary dismissal so that *inter alia*, a person under disability, could be protected by the court. Jacqueline Dennison was a minor. At the time of the defendant's initial attempt to dismiss the case so as to attempt to affect approval of a settlement in state court, the court properly retained jurisdiction and urged the minor's mother that counsel be obtained. Counsel was obtained and as a result the settlement ultimately approved was substantially better for the minor. The presence of the 1983 claim further imposed upon the court a duty to oversee the settlement. In essence, the petitioner is complaining because the trial judge performed the duties required of him.

In summary, the court had jurisdiction. The trial court properly so-held and its holding was affirmed by the Sixth Circuit after a lengthy discussion on the merits.

II.

THE TRIAL COURT'S ORDER DID NOT CIRCUMVENT STATE LAW OR POLICY.

The petitioner's argument as to circumvention of state law or policy has as a predicate the assumption that there was a valid attorneys' contingent fee agreement that was binding upon the estate. The petitioner's concern is not for the proportions in which the court allocated money among the beneficiaries. Rather the petitioner's complaint is that the court did not allocate enough money to himself and Ms. Brandy for attorneys' fees.

The court set fees on a *quantum meruit* basis. The petitioner does not contend that the court improperly applied the *quantum meruit* test, rather he contends that he should have received a lump sum based on the existence of a contingent fee agreement. In fact, the only contingent fee agreements in question were with Brunetta Brandy. Thus, Mr. Jarrett who was brought in to assist Ms. Brandy must rely upon any agreements she made. It is undisputed that prior to their appointment as co-personal representatives, the widow Mrs. Greene and Edniquech Grubbs, the daughter of the decedent (who had just become an adult) entered separate individual contingent fee agreements with Ms. Brandy. These individual fee agreements did not purport to be executed by them as personal representative nor to authorize a claim to be brought on behalf of the estate. After they were appointed co-personal representatives, they did not enter either jointly or severally into a fee agreement on behalf of the estate or did not profess jointly or severally to ratify the individual fee agreements on behalf of the estate. Interestingly, the absence of a fee agreement entered into on behalf of the estate was unknown to the various beneficiaries until the court ordered that the fee agreements be produced. Thus, the fact that court approval may not be needed in Michigan for the personal representatives to

retain an attorney on behalf of the estate is not controlling since they did not in fact retain anyone. Thus, the statement in Appendix D sub-Appendix B that Rose Mary Greene in her capacity as co-personal representative retained Brandy and Jarrett is erroneous. However, it is to be noted in the same sub-appendix that petitioner does not claim that Edniquech Grubbs in her capacity as co-representative ever retained Brandy or himself.

In any event, by the time of the abortive initial settlement, Gerald Thurswell was representing Edniquech Grubbs (no written agreement has been produced to indicate the nature of the employment and on behalf of which capacity).

At the time of the initial proposed settlement, the case was pending in the federal district court. Section 600.2922(5) of the Michigan Compiled Laws provides that a motion may be filed in the court where the action is pending asking leave to settle and that the court *shall* conduct a hearing and approve or reject the proposed settlement. Further, in light of the fact there was a 1983 claim, the court by virtue of federal law had the duty and right to examine the settlement as to fairness.

Further, in the event of settlement, subsection 6 provides that there shall be a hearing upon notice to the beneficiaries and the court shall enter an order distributing the proceeds in the amount the court considers fair and equitable concerning the relative damages sustained by each. This is precisely what the court retained jurisdiction to do and ultimately did.

The petitioner's contention that the court was circumventing state law is clearly erroneous. To the contrary, the petitioner endeavored to ram down through the court without a hearing a settlement which the petitioner had allocated among beneficiaries with a conflicting interest and had structured in

such a way that the gross settlement could not be accepted without also accepting the allocation. In so doing, the petitioner was attempting to usurp the power of the court granted it by Michigan statutes and by federal statutes. Similarly, the petitioner's contention that the court was bound by law to follow the March 7, 1993 memorandum between the parties misses three obvious points. First of all, the section relied upon has as a predicate "if none of the persons entitled to the proceeds is a *minor* . . .". As the Court of Appeals correctly observed, Jacqueline Dennison was a minor! Accordingly, the section has no relevancy. Further, it is respectfully suggested the section does not control the court's duties and powers where there is a 1983 claim asserted. Finally, the section concerns allocation between the beneficiaries and does not speak to an agreement as to attorney's fees.

The trial court correctly analyzed the facts and the law and determined that there was not a valid contingent fee agreement. Accordingly, the fact that under Michigan law a valid contingent fee agreement up to a certain percentage should be enforced is of no relevancy. While the co-personal representatives acting together can retain an attorney, the fact of the matter is they did not do so after they were appointed co-personal representatives. To the contrary, by the time they were appointed co-personal representatives, Edniquech Grubbs had already obtained an attorney other than the referring attorney. Neither Grubbs nor Rose Mary Green ever retained the petitioner.

As observed earlier, there was not a valid contingent fee agreement entered into on behalf of the estate by the personal representatives. Thus, the petitioner's reliance on MCR 8.121 is without foundation. Accordingly, the affect of the statute need not be considered on this case.

III.

DISQUALIFICATION OF JUDGE.

As the court of appeals noted "there is no evidence of bias in this record". The motions were filed pursuant to 28 U.S.C. §§ 144 and 1455. Those sections must be read together. *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988). The record fails to disclose any merit whatsoever to the motion and thus there was no requirement for transfer to another judge. Further, disqualification under those sections is not based upon a disagreement with the judge's view of the law but rather upon a personal bias. The record below shows a great deal of disagreement between the petitioner and the court as to how the controlling law applied and as to what law controlled. The record is devoid of evidence that the judge had a personal bias against any of the parties or the attorneys. To the contrary, the judge showed admirable patience with the petitioner's machinations which resulted in a situation where the gross amount of the settlement was agreed to in December of 1992 but the order allocating the proceeds was delayed until November 7, 1994 (when the court entered its order on the October 21, 1994 hearing). There is no basis in the record to grant the certiorari petition based upon the claim that the judge should have been disqualified.

CONCLUSION

As the Circuit Court of Appeals observed in its opinion below, "it is time to bring an end to this unseemly spectacle". What a spectacle it has been. The petitioner's conduct delayed the initial partial distribution for a year and a half. To this day, a portion of the funds remain undistributed because of the petitioner's continuing appeals. While the petitioner certainly has the right to utilize the appellate procedure, there has been a thorough review by the Sixth Circuit resulting in a detailed opinion which correctly affirms the trial court. It is respectfully suggested the United States Supreme Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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